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QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* -- both its substantive and its administrative requirements -- apply to employers of U.S. citizens overseas?[1]

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[1] Petitioners state the question as whether "Title VII prohibits employment discrimination outside the United States by an American corporation against an American citizen." EEOC Brief at i. Their arguments, however, if valid, would make Title VII applicable also to the conduct of foreign corporations, whether or not subsidiaries of American firms, vis-a-vis their American employees, and the EEOC's most recent policy statement in this area says that foreign companies are subject to Title VII in their dealings with Americans. Policy Statement No. N-915.033, EEOC Compl. Man. (BNA), at 605:0055 (Sept. 2, 1988). Therefore, we restate the question to indicate the full scope of the issue before the Court.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

Nos. 89-1838 and 89-1845

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ARABIAN AMERICAN OIL CO., ET AL.
Respondents.

ALI BOURESLAN,

Petitioner,

v.

ARABIAN AMERICAN OIL CO., ET AL.
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE RESPONDENTS

INTEREST OF THE *AMICUS*[2]

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law center with more than 120,000 members throughout the United States. WLF engages in litigation to promote and protect the free enterprise system, and the economic and civil liberties of individuals and businesses. WLF has appeared before this Court on numerous occasions in Title VII and other civil rights cases. *E.g.*, *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989). In addition, WLF has published a monograph, *Affirmative Action from Kennedy to Reagan: Redefining American Equality* (1984), by Professor Herman Belz, which makes the case that the Department of Labor's Office of Federal Contract Compliance Programs has not resulted in the empployment of more minorities in the private sector, but has imposed an enormous cost on businesses just to establish and administer compliance programs.

Consistent with this program, WLF abhors irrational employment discrimination,[3] such as that prohibited by

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[2] Counsel for all parties have consented to the filing of this *amicus* brief. Their written consents are on file with the Clerk of this Court.

[3] We use the term "irrational discrimination" when referring to the types of discrimination prohibited by Title VII. Taken literally, "employment discrimination" would mean all differentiation by an employer between employees or applicants. Obviously, however, some employment discrimination is desirable and rational, such as differentiation between competent and incompetent employees, or between qualified and unqualified applicants. Indeed, Title VII itself recognizes that discrimination on the basis of some of the factors it generally prohibits -- sex, religion or national origin -- (continued...)

Title VII of the Civil Rights Act of 1964. WLF therefore supports rational government action to prevent and eliminate irrational discrimination. WLF also recognizes, however, as we discuss below, that free and unfettered competition among employers tends to avoid or eliminate irrational discrimination. Moreover, WLF is concerned because government action intended to prevent or eliminate irrational discrimination may sometimes have the opposite effect -- it may, in fact, encourage such discrimination instead. Therefore, it is essential that the courts interpret the civil rights laws in a way that combats irrational discrimination rather than promotes it. In particular, since Title VII regulates the market for labor, it is important to employ economic analysis to ensure that the law is not unintentionally and unnecessarily interpreted in a way that causes it to have effects contrary to its purposes.

In this brief, we hope to bring to the attention of the Court relevant matter that has not already been raised by the parties or other *amici curiae*. Among other things, we will explain why reversing the judg-

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[3](...continued)
can sometimes be rational: the statute provides that such discrimination is lawful when one of these factors "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). On the other hand, discrimination on the basis of race or color is never rational, and is never justifiable as a matter of law under Title VII.

The courts have construed the "bona fide occupational qualification" defense very narrowly, often at the urging of the Equal Employment Opportunity Commission or the *amici* supporting the Government's position here. It is therefore rather surprising that the EEOC and those *amici* are now arguing that a broadening of this defense would be appropriate to protect against the problems that extraterritorial application of Title VII would necessarily entail. In fact, such a broadening would not resolve the key problems, and could have deleterious effects at home.

ment of the court below and applying Title VII to conduct overseas would tend to induce discrimination that should be abhorrent to all, and that would run contrary to the very purposes of Title VII. WLF brings a unique perspective to this case because it brings an economic perspective to the fight against racial and other irrational discrimination, and has no other interest in the resolution of this case, political or economic.

STATEMENT OF THE CASE

Ali Boureslan is a Lebanese-born, naturalized American citizen, and a Muslim. He was employed by Aramco Services Company ("ASC"), a Delaware corporation, in July 1979 as a cost engineer, and worked for ASC in the United States. ASC was then a subsidiary of Arabian American Oil Company ("Aramco"), also a Delaware corporation. At Boureslan's request, in November 1980 he transferred to work for Aramco as a cost engineer in Saudi Arabia. In February 1981 he was assigned to be a construction engineer with Aramco in Saudi Arabia.

Boureslan began receiving poor performance reviews in early 1982. In February 1983 he filed a grievance with the company, alleging that his direct supervisor at the time, an Englishman, had mistreated and harassed him on account of Boureslan's race, national origin and religion. Aramco apologized to Boureslan, and disciplined and demoted the supervisor, to a point where he ultimately resigned. The company also transferred Boureslan to its design group. Boureslan continued to receive poor performance evaluations, and his employment with Aramco was terminated effective June 16, 1984.

Boureslan filed charges against Aramco with the U.S. Equal Employment Opportunity Commission ("EEOC"), alleging that Aramco had discriminated

against him on the basis of race, national origin and religion while he was employed in Saudi Arabia. Before the EEOC ruled on the merits of his charges, Boureslan filed suit against Aramco and ASC in the United States District Court for the Southern District of Texas, alleging violations of Title VII and state law. Aramco and ASC moved to dismiss the complaint for, *inter alia*, lack of subject matter jurisdiction. The district court granted this motion, a divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment, and that court again affirmed the dismissal after rehearing *en banc*. The district court and the court of appeals applied the presumption that statutes do not have extraterritorial application, *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), and found no clear indication that Congress intended to give Title VII extraterritorial effect. On petitions by Boureslan and the EEOC (which intervened during the court of appeals' *en banc* review), this Court issued writs of certiorari on October 1, 1990.

SUMMARY OF ARGUMENT

It is a long-standing principle of American law that a federal statute will not be given extraterritorial effect unless Congress clearly expresses its affirmative intention that the statute be given such effect. This principle is consistent both with international law -- by reducing the likelihood that persons will be subject to dual or conflicting regulation -- and with common sense. There is not, however, any clear statement by Congress of an affirmative intention to give Title VII extraterritorial effect. To the contrary, by modeling Title VII's jurisdictional provisions upon those of the other federal labor laws -- which do *not* apply overseas -- Congress indicated that Title VII, too, should not apply abroad.

Petitioners urge the Court to draw a negative inference from the "alien exemption" provision of Title VII. This provision, however, is subject to at least two different plausible explanations, only one of which would support the proposed inference, and probably the most that can be said about this provision is that no one will ever know for sure why it was put into Title VII. This can hardly serve as the clear expression of affirmative Congressional intent necessary to support extraterritorial application of Title VII.

Petitioners and the *amici* supporting them also suggest that it would be irrational for Title VII not to be given extraterritorial effect -- that Congress must have intended this because sound public policy demands it. In fact, however, there are sound public policy reasons why Congress might not want to apply Title VII overseas. For one thing, since aliens employed overseas, even by American companies, definitely do not have standing under Title VII, if Americans had such standing, companies overseas would have a strong incentive to discriminate against Americans by refusing to hire them at all -- a result that Congress probably would not want to secure. Moreover, if Title VII, and all the administrative costs it brings with it, would apply only to American companies abroad, those companies would be placed at a significant competitive disadvantage relative to foreign firms -- another result that Congress might prefer to avoid.

Of course, despite these effects, Congress could decide to apply Title VII overseas, but they illustrate the wisdom of the rule that Congress must address this question directly. This Court should not rely upon a negative inference from a provision whose true meaning is unknown, and probably unknowable.

Finally, *amici* supporting the petitioners argue that if Title VII is not given extraterritorial effect, American companies overseas will go on a wild rampage of

racism, sexism, and every other type of conduct that Title VII is meant to prohibit. This is nonsense. Employment discrimination by American companies against Americans overseas has not been a major problem, and the hypothetical conduct these *amici* conjure up is utterly implausible.

The judgment of the court of appeals should therefore be affirmed.

ARGUMENT

I. LEGISLATION SHOULD BE GIVEN EXTRATERRITORIAL EFFECT ONLY WHEN CONGRESS CLEARLY EXPRESSES ITS AFFIRMATIVE INTENTION TO GIVE THE LEGISLATION SUCH EFFECT.

Petitioners concede, as they must, "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros., Inc. v. Filardo*, *supra*, 336 U.S. at 285, citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932). *See also American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909). Petitioners ignore, however, this Court's rulings that to find extraterritorial applicability "there must be the affirmative intention of the Congress clearly expressed." *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). *Accord*, *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 21-22 (1963) (quoting *Benz*, *supra*); *Foley Bros., Inc. v. Filardo*, *supra*, 336 U.S. at 286 ("An intention . . . to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.") Instead, petitioners would have the Court give extraterritorial effect to Title VII on the basis of a negative inference from the so-called

"alien exemption" provision of Title VII, 42 U.S.C. 2000e-1. The Court should decline this invitation to reverse the rule of *Foley Bros.*, *Benz* and *McCulloch* that a statute will not be given extraterritorial effect unless Congress clearly expresses an affirmative intention that the statute have such effect.

A. The *Benz* rule is consistent with international law.

International law recognizes two general bases for the exercise of jurisdiction by a nation: territoriality and nationality. *Restatement (Third) of Foreign Relations Law of the United States* (hereinafter "*Restatement*") § 402 (1986). Briefly stated, the territorial principle permits a state to prescribe law with respect to conduct or persons within its territory. The nationality principle permits a state to prescribe law with respect to its nationals whether they are within or without its territory.

"Territoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction." *Id.*, comment b. Territoriality is "by far the most common basis for the exercise of jurisdiction . . . and it has generally been free from controversy." *Id.*, comment c. Controversy does arise, however, in connection with a particular subcategory of the territorial principle: the effects principle. It is the position of the United States, and this is reflected in the *Restatement*, that a state may prescribe law with respect to conduct outside its territory that has substantial effect within its territory, even if that conduct is lawful where carried out. *Id.*, comment d. Understandably, not all other countries accept this position.

In addition to this potential for controversy under the effects principle, there is obviously great opportunity for conflict when the nationality principle is applied to

regulate conduct subject to another state's regulation pursuant to the territoriality principle. As a matter of international law, a state *may* exercise jurisdiction under the nationality principle even if another state is exercising jurisdiction under the territorial principle as long as the prescriptions of the two states do not conflict. Thus, a person may have to comply with two different rules. And as a matter of United States law, statutes *may* be given extraterritorial effect even if to do so would violate international law. International law requires, however, and common sense suggests, that states not act unreasonably, and not impose dual or conflicting obligations upon persons without careful consideration of its implications.

The *Benz* rule is thus consistent with international law and common sense. It does not take away from Congress the power to employ the nationality principle to impose dual, or even conflicting, obligations upon American citizens abroad. All it requires is that Congress clearly and affirmatively express its intention to achieve such a result before a statute will be interpreted to impose it. Petitioners here argue that Title VII can be given extraterritorial effect on the basis of either the effects principle or the nationality principle. Even assuming *arguendo* this is correct -- and we have serious reservations about whether the effects principle is legitimately applicable here -- particularly because those are the two principles involved, it is appropriate for the Court to adhere to the *Benz* standard and not give Title VII extraterritorial effect absent a clear, affirmative statement by Congress that the statute should be applied overseas.

B. The *Benz* rule also is consistent with other considerations of public policy.

As this Court has recognized in another context, as a general rule:

> the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific Railway v. United States, 356 U.S. 1, 4 (1958). This is as true of labor markets as it is of other markets.

Sometimes, it is appropriate to regulate markets, to correct or compensate for some market failure. It is easy, however, to regulate in a fashion that makes things worse than they were before the regulation began. Moreover, the same type of regulation may have very different effects under different circumstances. For example, the very principle underlying Title VII's drive to promote equal employment opportunity -- equal pay for equal work -- has been applied elsewhere, such as in South Africa, to deny equal employment opportunity. W. Williams, *The State Against Blacks* 39-40 (1982).

Therefore, it is critically important for Congress to study carefully, and be familiar with, any market it decides to regulate. Congress will always be less familiar with conditions abroad than with conditions at home. Therefore, from this perspective, too, it is appropriate to require, as *Benz* does, that Congress make its intention plain whenever it intends to apply a regulatory scheme overseas.

II. CONGRESS HAS NOT CLEARLY EXPRESSED AN AFFIRMATIVE INTENTION TO GIVE TITLE VII EXTRATERRITORIAL EFFECT.

Petitioners try to find indications of Congress' intent to apply Title VII overseas in two provisions of the statute. Neither, however, rises to the level required by *Benz*: "the affirmative intention of the Congress clearly expressed." Indeed, one indicates that Congress did *not* want Title VII to apply abroad.

Petitioners first argue that Title VII's definition of an "employer", in 42 U.S.C. § 2000e(b), is broad enough to include firms overseas. The EEOC asserts that Title VII's jurisdictional provisions are similar to those of the Lanham Act, which reach behavior outside the United States. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). This simply is not correct.

In *Steele*, this Court relied upon the Lanham Act's definition of "commerce" as "all commerce which may lawfully be regulated by Congress." *Id.* at 284, quoting 15 U.S.C. § 1127. Behavior by American companies overseas "may lawfully be regulated by Congress," and thus the Lanham Act clearly expresses an intention to reach such conduct. Title VII, however, does not use such all-encompassing language. Instead, Title VII regulates the behavior of employers, which it defines as "person[s] engaged in an industry affecting commerce." 42 U.S.C. § 2000e(b). An industry affecting commerce is "any activity, business or industry in commerce or in which a labor dispute would hinder or obstruct commerce . . . and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959." 42 U.S.C. § 2000e(h). And "commerce" is defined in Title VII, at 42 U.S.C. § 2000e(g), in terms virtually identical to the definition of "commerce" for purposes of the labor laws, at 29 U.S.C. § 152(6). Thus,

Title VII was designed to have the same reach as the federal labor laws -- the very statutes that were the subject of *Benz* and *McCulloch*, and that this Court held do *not* have extraterritorial effect. Since both *Benz* and *McCulloch* were decided before Title VII was enacted, Congress' deliberate decision to pattern Title VII's jurisdictional reach upon that of the labor laws indicates a deliberate Congressional decision *not* to give Title VII extraterritorial effect.

Petitioners also argue strenuously that Title VII's "alien exemption" clause, 42 U.S.C. § 2000e-1, necessarily implies that the statute should otherwise have extraterritorial effect. Even if this were correct, the sort of negative inference necessary to reach this conclusion would not constitute the clear expression of an affirmative intention required by *Benz*. Moreover, this provision does not necessarily imply any such thing.

The alien exemption provides that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State." Petitioners argue that this provision would be superfluous if Title VII did not otherwise apply to employers with respect to the employment of Americans in foreign countries. Once again, they are simply wrong: the alien exemption would deny standing under Title VII to aliens employed in many U.S. possessions. While this may not seem like a major issue today, it was at the time the verbiage of the alien exemption entered the Congressional lexicon.

The alien exemption first appeared in a fair employment bill introduced by Rep. Adam Clayton Powell in April 1949. H.R. 4453, 81st Cong., 1st Sess. Just a year earlier, this Court had held that leased military bases in foreign nations constituted "possessions" for purposes of the Fair Labor Standards Act, *Vermilya-Brown Co. v. Connell*, 335 U.S. 377

(1948), thus making aliens employed on such bases entitled to all the benefits of that Act. Many members of Congress were upset by this result. Congressman Powell, knowing that it would be enormously difficult to enact any sort of federal fair employment law, may very well have been trying to avoid a fight over the civil rights of aliens employed in U.S. possessions.

The EEOC has suggested a different motivation for Congressman Powell, and the truth may be something entirely different. But the very fact that the best we can do is speculate about the origins and purpose of the alien exemption underscores the point that this provision does not constitute a clear expression of an affirmative intention by Congress to give Title VII extraterritorial effect.

III. THERE ARE SOUND PUBLIC POLICY REASONS FOR CONGRESS NOT TO GIVE TITLE VII EXTRATERRITORIAL EFFECT.

Petitioners and the *amici* supporting them seem to suggest that Congress must have intended to give Title VII extraterritorial effect, because eliminating employment discrimination is a critically important public policy, and there could not be any good reason for Congress not to apply that policy overseas. We would therefore like to suggest two reasons why Congress might choose not to apply Title VII overseas. Again, we do not question the power of Congress to do so. Nor are we suggesting that the Court should weigh the alternatives and decide which would be the better policy. Rather, we simply wish to demonstrate that there is a policy decision to be made -- and we respectfully urge the Court to leave that policy decision to the Congress.

Giving Title VII extraterritorial effect would not mean just that companies operating overseas could not

discriminate on the basis of race, color, sex, religion or national origin in their dealings with American employees. It would mean also that those companies would be subject to the full administrative panoply of Title VII -- and the very substantial costs that come with it. Even with respect to domestic employers, Congress exempted from Title VII's coverage all employers with less than 15 employees. No one would doubt that an employee discriminated against because of his race by a small company is just as wronged as his counterpart discriminated against by a larger concern. Congress exempted small companies not because there is less discrimination by them, but because the costs incurred in defending against meritless charges, and for establishing compliance programs and the like, would be unduly burdensome for small concerns.

Not engaging in irrational discrimination does not impose costs upon a company. To the contrary, when an employer engages in irrational discrimination it imposes costs upon itself that place it at a competitive disadvantage relative to non-discriminating employers. Discriminating employers reduce the supply of labor available to themselves, and it is a fundamental axiom of economics that price (here, the cost of labor) goes up as supply goes down. T. Sowell, *Markets and Minorities* 34-51 (1981); G. Becker, *Economics of Discrimination* (1957). However, investigations by the EEOC, and private lawsuits under Title VII, do impose very substantial costs upon employers, even if no discrimination has occurred.

If all, or even most, EEOC investigations found discrimination, these costs might be of little concern -- they might even be outweighed by the savings the targets would reap by ending their discrimination. In fact, however, only a small fraction of EEOC investigations find discrimination. For example, in its fiscal year 1989, the latest for which data are available,

the EEOC determined the merits of 66,209 charges that had been filed with it, and found merit in only 11,156 (16.8%) of those charges. Office of Program Operations, EEOC, Annual Report for Fiscal Year 1989, at B.2. But the employers who were the targets of the 55,053 charges that were found to be without merit still had to incur very substantial expenses in responding to those charges. And 1989 was not atypical: in 1988, the EEOC found merit in only 10,641 (15.0%) of the 70,749 charges it resolved; in 1987, in 8,114 (15.2%) of 53,482; in 1986, in 9,613 (15.2%) of 63,446; and in 1985, in 10,935 (17.2%) of 63,567. *Id.* Thus, during this five-year period, out of 317,453 charges resolved by the EEOC, 266,994 (about 85%!) were found to be without merit -- but only after the target companies had incurred substantial expenses responding to them. Indeed, the total number of charges found to have merit during this entire time frame was less than the number found to be meritless in 1989 alone!

Thus, Title VII brings with it not just an obligation not to engage in irrational discrimination -- which is in firms' economic self-interest anyhow -- but also the very substantial cost of dealing with meretricious charges of discrimination. Imposing those costs upon American firms operating overseas could have some very perverse and undesirable effects.

A. Applying Title VII overseas would encourage companies to discriminate against American citizens in their hiring.

First, since Title VII plainly does not cover aliens employed abroad, companies operating overseas would have a clear incentive to prefer aliens over American citizens in their hiring. American citizens would bring with them the potential cost of an EEOC investigation or a private lawsuit; aliens would not. And it is not

enough to say that a company could avoid such costs just by complying with the law, because as we just pointed out, 85% of the time when charges are filed with the EEOC, it determines that the company involved did comply with the law.

Nor should the potential effect of this cost differential be underestimated. Studies have found that in the United States, companies discriminate against hiring marginally qualified blacks because of the potential cost of EEOC investigations and lawsuits if they are hired and ultimately not promoted or fired. 2 *Selected Affirmative Action Topics in Employment and Business Set-Asides*, U.S. Commission on Civil Rights 115 (1985) (statement of Dr. Finis Welch).

It would certainly be anomalous if as a result of extending the reach of our nation's antidiscrimination laws, we ended up encouraging companies overseas to discriminate against Americans by not hiring them in the first place. But more importantly for present purposes, this result is an example of why it is so important to adhere to the *Benz* rule, and not to apply Title VII overseas unless and until Congress clearly says to do so.

B. Applying Title VII overseas would place American firms at a competitive disadvantage relative to foreign firms.

Furthermore, while the logic of petitioners' arguments would suggest that all foreign employers would be subject to Title VII in their dealings with American employees, even the EEOC recognizes that only some foreign employers would actually be covered. Policy Statement No. N-915.033, EEOC Compl. Man. (BNA), at 605:0055 (Sept. 2, 1988). Foreign employers not subject to Title VII would have a cost advantage over American firms overseas. Considering the broad

debate and concern over this country's competitiveness in overseas markets, it would be perfectly reasonable for Congress to conclude that the amount of employment discrimination occurring overseas does not justify placing American firms at a competitive disadvantage. Again, this illustrates the wisdom and importance of the *Benz* rule.

IV. AFFIRMING THE JUDGMENT BELOW WILL NOT PROMPT AN EXPLOSION OF DISCRIMINATION BY AMERICAN COMPANIES OPERATING OVERSEAS.

Finally, we wish to respond very briefly to the suggestion by petitioners and some of the *amici* supporting them that if this Court affirms the judgment of the court of appeals, there will be an explosion of racism, sexism, and all sorts of other loathsome conduct at American firms overseas. Petitioner Boureslan even conjures up images of sexual assaults in airplane lavatories somewhere over the Atlantic! Boureslan Brief at 9. This is just plain silly.

First, as we explained earlier, irrational discrimination imposes costs upon a firm. Therefore, there is a strong market incentive for firms to avoid such discrimination, even when not required to do so by statute. A firm that tolerated sexual assaults in lavatories over the Atlantic would find itself losing both employees -- male and female -- and customers.

Moreover, employment discrimination at American firms operating overseas has never been a major problem, except for discrimination against Jews and women in certain Moslem countries -- a type of discrimination that petitioners would allow to continue under the "bona fide occupational qualification" proviso of Title VII! EEOC Brief at 27. The first time the EEOC ever found merit to a charge of discrimination

overseas was in 1985 -- 21 years after Title VII was enacted. Considering the low level of the problem historically, there is no reason to expect an explosion of discrimination at this late date.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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